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Kuzev v. Roha Sheet Metal Ltd.

Jovan Kuzev, Plaintiff, Respondent and Roha Sheet Metal Ltd. and Kriste Spasevski, Defendants, Appellants

Ontario Superior Court of Justice (Divisional Court)

Lane J.

Heard: March 20, 2007
Judgment: March 22, 2007
Docket: 06-66-000

Proceedings: affirming *Kuzev v. Roha Sheet Metal Ltd.* (2006), 2006 CarswellOnt 8891 (Ont. S.C.J.)

Counsel: Marvin B. Shifman, for Appellants

Jordan B. Farkas, for Respondent

Subject: Civil Practice and Procedure

Civil practice and procedure --- Trials -- Conduct of trial -- Powers and duties of trial judge -- General principles.

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 134(6) -- considered

***Lane J.*:**

1 The appellant appeals from the judgment of Deputy Judge Mungovan dated January 26, 2006 in the Small Claims Court at Toronto whereby the plaintiff was awarded $4000 plus costs and interest for work done by the plaintiff.

2 The plaintiff's case was that the defendant, Spasevski, on behalf of Roha, came to his home and asked him to supply and install certain doors for a building in the London area. He did so and invoiced Roha, but was not

paid. The defendant took the position that the plaintiff was merely introduced to the building owner by Spasevski and did the work directly for the owner, NITS Investments Ltd. Therefore NITS should pay him.

3 At the trial, the plaintiff and his wife both testified to the meeting at which Spasevski begged the plaintiff to do the work. The trial judge accepted that evidence in preference to the evidence of Spasevski, finding on the balance of probabilities that the contract was made with Roha, Spasevski's company. He said that Mr. Kuzev's evidence alone left no doubt, and it was reinforced by the evidence of his wife, who was very clear on what she heard. In addition, he relied on a letter from the Account Manager of NITS who wrote that their cheque #3332, which was in evidence, payable to Roha, was for the supply and installation of the doors in question. The cheque was for $5000, not $4000 and the trial judge accepted the evidence of the plaintiff that the difference was a $1000 profit for Spasevski. The defendant said that the cheque was to pay him for other work he had done for NITS, and had nothing to do with the plaintiff.

4 Although a number of other issues are addressed in the factum of the appellant, counsel narrowed the appeal to two points: the trial judge's intervention by calling a witness on his own initiative and otherwise assisting the plaintiff; and the way in which the judge dealt with the cheque which NITS says was the payment for the work done by the plaintiff.

5 Much of the appellant's argument before me was about the cheque. Mr. Shifman did not object in principle to the judge relying on the letter explaining the cheque but submitted that he gave it too much weight. Once he learned that NITS had an interest in ensuring that the cheque was regarded as payment of the plaintiff's claim, the judge should have been cautious about the letter and the cheque and should have intervened to get better evidence. In particular, the judge should have been suspicious of the reference line which now appears on the original cheque: "Doors London" and some figures adding up to $5000. The defendant produced a copy of the cheque without the reference line, and the agent for Spasevski wanted a finding at the trial that the plaintiff had inserted these words fraudulently.

6 The transcript reveals that the trial judge was alive to the problem. He was satisfied that the plaintiff had not changed the cheque and spent half a page of the reasons speculating at large on who might have done so and why. In the end, he rejected the submission that the plaintiff was a fraud and had changed the cheque. The appellant objects that the trial judge lost the appearance of fairness when he did not intervene to advise the defendant to obtain better evidence from NITS to clarify why the cheque was sent to Roha. The court already had the letter from NITS and was not asked to adjourn so that the Accountant could be brought to be cross-examined.

7 In my view, the trial judge did not have the duty to intervene cast upon him by counsel for the appellant. Ours is an adversary system under which the parties are expected to place their evidence before the court. The court does not play an investigative role. If the judge had been asked to grant an adjournment to enable better evidence to be brought, that would raise different issues, but that was not done. Further, the reference line on the cheque was not the only evidence as to the purpose of the cheque. There is also the letter from the Accountant. If the defendant had doubts as to the purpose of the cheque, he could have summoned the Accountant as a witness. The submissions for the appellant assumed that anyone adding the reference line did so to mislead, but it is also possible that it was put on with an intention to clarify the purpose for which the cheque was issued. The trial judge seemed to favour the idea that NITS put the reference line there as the most probable explanation, but that was speculative as there was no actual evidence. The cheque with the reference line was attached to the Claim served and filed by the plaintiff and it was clear from the start that it would be an important piece of evidence. There is no issue of surprise in that connection. The question of the weight to be attached to particular pieces of

evidence is ground upon which an appellate court ventures only rarely, for it is bound to give deference to the trial judge who has seen and heard the witnesses. I can see no palpable or overriding error in the way the trial judge dealt with the evidence about the cheque.

8 The appellant further submitted that the trial judge lost the appearance of impartiality and acted improperly in calling the wife of the plaintiff as a witness on his own initiative. What happened was that the plaintiff announced at the start of the trial that he had two witnesses, himself and his wife. No one asked that she be excluded while he testified. When he had completed his evidence, the judge asked if his wife wished to give evidence and Mr. Kuzev said No. The judge asked the wife and she said: "That's it, what he says, my husband said." The judge then said she should come up as he would like to hear what she had to say. She was sworn and briefly described the conversation essentially confirming what her husband had said occurred. The agent for the defendant made no objection and did not cross-examine her. In a sense, the judge did the defendant a favour. He had already heard the gist of the wife's evidence in the brief passage I have quoted and, by calling her, he enabled the defendant to cross-examine her, although as it happened there was no cross-examination.

9 It was submitted that the trial judge lost the appearance of impartiality by calling the wife to testify. I do not agree. No reasonable person, aware of the facts and having considered the matter, would believe that because he had the wife testify in these circumstances, the judge would not deal fairly with the case. Nor did the judge assist the plaintiff in an inappropriate manner. A judge in the Small Claims Court has a difficult role to play because so many of the parties are unrepresented. If justice is to be done, such parties often require some instruction as to how to conduct themselves and the judge may properly give them some assistance. My reading of the transcript does not disclose any intervention by the judge that casts any doubt about his impartiality.

10 A trial judge is not entitled to call witnesses on his own initiative without the consent of the parties[FN1] . While no one voiced any objection to the trial judge doing so here, the trial judge stepped across the line when he called Mrs. Kuzev. On the other hand, the court and the defence had been advised that she would be called, and the agent for the defendant did not object and did not cross-examine her. Her evidence did not enter new ground, being no more than corroborative of her husband. In my view, there has been no substantial wrong or miscarriage of justice by reason of her having given evidence. Accordingly, section 134(6) of the Courts of Justice Act[FN2] applies and I ought not to order a new trial on this ground alone. There is no other ground on which I could do so.

11 For these reasons, the appeal is dismissed. Costs will follow the event. If the parties cannot agree the costs, they may make brief written submissions within twenty days.

FN1. See: Sopinka, Lederman and Bryant: *The Law of Evidence in Canada* (2nd ed.) Butterworths, paragraph 16.12

FN2. 134(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred.

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